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ABBREVIATIONS.

R.=Transcript of record.
Com. Rep.=Commission's report.
I. C. C.=Interstate Commerce Commission.
I. C. C. R.=Interstate Commerce Commission Reports.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1906.

The Illinois Central Railroad Company et al., Appellants, v. The Interstate Commerce Commission, Appellee.	No. 588.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

ARGUMENT FOR APPELLEE.

I.

STATEMENT OF CASE.

The order sought to be enforced in this case was the result of an investigation by the Commission of a complaint made to it under section 13 of the act to regulate commerce which provides that complaints may be made to the Commission by "any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization" on the ground "of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof."

The complaint to the Commission was made by the "Central Yellow Pine Association," an incorporated association composed of "persons, firms, and corporations," engaged in the business of manufacturing yellow pine lumber in the States of Mississippi, Alabama, and that part of Louisiana east of the Mississippi River.

The defendants are common carriers by rail engaged in interstate commerce and in particular in the transportation of yellow pine lumber from the mills and lumber plants of the members of the Central Yellow Pine Association in said territory to, for the most part, the territory known as "Central Freight Association Territory," which lies on and north of the Ohio River and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, and the members of the Central Yellow Pine Association are dependent upon the defendants for the transportation of their lumber to the markets of the country.

harges in complaint of Central Yellow Pine Association.

The complaint to the Commission of the Central Yellow Pine Association charged in substance that the defendants, on the one hand, and, on the other hand, the several railway companies carrying yellow pine lumber into the same markets in Central Freight Association territory from the territory west of the Mississippi River, embracing the States of Texas, Arkansas, and that part of Louisiana west of the river, by agreement or concert of action advanced the rate on yellow pine lumber from the territories both east and west of the Mississippi River to points

on and beyond the Ohio River in said Central Freight Association territory, 2 cents per hundred pounds, making said advance applicable south of the Ohio River and effective on and from April 15, 1903, except as to the Louisville & Nashville road, as to which it became effective June 22, 1903; and that said increase on yellow pine lumber was "*unjust, unreasonable,* and discriminatory, in violation of the provisions of the act to regulate commerce."

The allegation that the advance was "unjust and unreasonable" is a charge of a violation of section 1 of the act to regulate commerce which requires that all rate charges shall be "*reasonable and just,*" and forbids every "*unjust and unreasonable*" charge for the transportation of property or any service in connection therewith.

There are a number of other charges in the complaint of the Central Yellow Pine Association, but this is the main charge—the charge which the Commission sustained and upon which its order is based.

The order of the Commission.

The Commission having, after due investigation, sustained the charge that the advanced rate was *unjust* and *unreasonable,* issued the order sought to be enforced which simply required the defendants "to cease and desist on or before the first day of April, 1905, from further maintaining or enforcing the unlawful advance of 2 cents per hundred pounds, or the said unlawful rates resulting therefrom, for the transportation of lumber from shipping points on defendants' respective lines in the State of Louisiana east of the Mississippi River and in the States of Mississippi

and Alabama to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio River commonly called and known as Ohio River points."

This order is in strict pursuance of the language o section 15 of the act which provides that, "if the Commission, after the investigation of a complaint before it, shall find that a carrier has been guilty of a violation of the act, it shall issue a notice to said carrier to cease and desist from such violation." Orders of this character, requiring carriers to cease and desist from enforcing rates found to be unlawful, have been sustained by the courts in a number of cases.

I. C. C. v. *Chic., Bur. & Quincy R. Co.* (94 Fed. Rep., 273);
I. C. C. v. *L. & N. R. R. Co.* (118 Fed. Rep., 616).

The defendants having refused to obey the order, the Commission instituted the present proceeding for its enforcement, under section 16 of the act in the Circuit Court of the United States for the Eastern District of Louisiana. That court rendered a decree for the enforcement of the order (R., 513), and the case is now in this court on appeal by the defendants from that decree.

II.

BURDEN ON DEFENDANTS.

The question is whether the advance of 2 cents per hundred pounds in the lumber rate, the maintenance of which is forbidden by the order of the Commission, was unjustifiable and resulted in unreasonable rates, as found by the Commission.

The rates to the Ohio River crossings—Evansville, Louisville, and Cincinnati—are based on Cairo. From May 1, 1894, to September 9, 1899, a period of five years and four months, the Cairo rate was 13 cents. On September 9, 1899, the Cairo rate was advanced to 14 cents and remained 14 cents from that date to April 15, 1903, a period of about four years, when the 2 cents advance complained of in this case was made and the Cairo rate was raised to 16 cents. The advanced rate, 16 cents, is, therefore, 3 cents higher than the rate in force from May, 1894, to September, 1899, five years and four months, and 2 cents higher than the rate in force from September, 1899, to April, 1903, about four years.

When carriers advance a rate which has been for some time in force the burden is upon them to show sufficient grounds for such advance.

Am. & Eng. Enc. of Law, Vol. XVII, 133;
Holmes v. *So. Ry. Co.* (8 I. C. C. R., 568).

III.

PROSPERITY OF CENTRAL YELLOW PINE ASSOCIATION.

The grounds or excuses set up by the defendants for the advance in the lumber rate are, we contend, wholly insufficient.

We will first notice the claim that the advance was justifiable because the yellow-pine industry was exceptionally prosperous and resulted in great profits to those engaged therein.

It is manifest, and the Commission so finds, that the test of the reasonableness of a rate is not the amount

of profit in the business of the shipper, but whether the rate yields a reasonable compensation for the service rendered. In *Smythe* v. *Ames* (169 U. S., 466) this court holds that "the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered are reasonably worth."

If the prosperity of the shipper is to have a controlling influence, a higher rate would be justified on the traffic of a prosperous shipper than on that of one less prosperous *and there could be no uniformity of rates.*

If the carrier has the right to advance the rate when the shipper's business grows more prosperous, then it follows that the carrier should reduce the rate when that business grows less prosperous.

If the carrier has the right to advance the rate when the business of the shipper grows more prosperous, then the shipper, it would seem, has the right to demand that the carrier should reduce the rate *when the business of the carrier increases in prosperity.* The shipper has as much right to share in the prosperity of the carrier as the carrier has to share in the prosperity of the shipper.

The proof shows that the business of the defendants has phenomenally increased, both before and since the advance in the lumber rate.

Tift v. *Southern Railway Company et al.* (138 Fed. Rep., 754).

The case of *Tift* v. *Southern Railway Company et al.* is closely analogous to, if not identical with, the case at bar. The Tift case involves an advance in the lumber rate of 2 cents per hundred pounds (the same as in the present case, and made on the same day) from Georgia lumber shipping points to Cairo and the Ohio River crossings, and was made by *concert of action or agreement by the defendants in that case with the defendants in the case at bar.*

The same excuses were set up for the advance in the Tift case as in the present case, and among them the contention which we are now considering, that, the mill business being prosperous, the carriers have the right to participate in that prosperity by advancing the lumber rate. The Circuit Court for the Eastern District of Georgia, in overruling that plea, held that—

"Railroads have no legal right to graduate their charges in proportion to the prosperity which attends industries whose products they transport." (*Tift* v. *So. Ry. Co. et al.*, 138 Fed. Rep., 754.)

The contention that the advance in the lumber rate was justified because of the large profits in the lumber business is consistent with the idea, if it is not an admission, that the rate before the advance was in itself reasonably remunerative.

The increased prosperity of shippers along the line of a railway enlarges the business of those shippers, and, as a consequence, both the tonnage of traffic which they receive in their business and which they ship to their customers. In this way the carrier necessarily and justly participates in, or is benefited by, the prosperity of the shipper.

This appears to be the case with these defendants, as the tonnage of lumber shipped by complainant's members over defendants' lines and the revenue of defendants therefrom have constantly grown in amount.

(Com. Rep., R., 83.)

LUMBER BUSINESS TEMPORARY.

Another important fact to be considered in this connection is that, while the lumber business may have yielded large profits, it is temporary, and not permanent like that of the railway companies. After the lumber is all cut from the land, the lumber-mill equipment, such as mill buildings, machinery, etc., becomes practically worthless, and consequently lumber-mill men in their business must anticipate the time when a large part of their investment will become valueless.

When this loss or sinking of capital is taken into account, the net returns from the lumber business are not exceptionally large.

IV.

INCREASE OF OPERATING EXPENSES DUE LARGELY TO GROWTH OF BUSINESS.

In the next place, the defendants contend that the advance in the lumber rate was rendered necessary by increases in their operating expenses, resulting from higher wages paid their employees and higher prices of the material and equipment used by them.

The proof shows increases in wages and in prices of material and equipment and these increases have doubtless added materially to operating expenses, but the total annual increases in these expenses are due only in part to the advances in wages and prices of supplies and equipment.

They are attributable for the most part to the constant growth of the business of the roads. Not only has the lumber business of the roads greatly increased, but their business in general.

The great increase in the business of the defendants is shown by the increase in their gross earnings from operation reported by them to the Commission. For example:

The Illinois Central R. R. (lines south of Cairo), 1890, gross earnings from operation	$5,644,115
For 1903	16,193,850
Increase	10,549,735

The increase in operating expenses during those thirteen years from 1890 to 1903 was $6,072,931, being over $4,000,000 less than the increase in gross earnings.

L. & N. R. R. Co. (lines south of Ohio), 1890, gross earnings from operation	$11, 841, 865
For 1903	33, 334, 612
Increase	21, 492, 747

The increase in operating expenses was $15,570,341, about $6,000,000 less than the increase in gross earnings.

The figures showing these increases as to the other defendants are given by the Commission in its report and opinion. (Com. Rep., R. 73–74.)

V.

INCREASE IN NET EARNINGS.

The increase in the gross earnings of the defendants, it is thus seen, have far exceeded the increase in operating expenses, so that it appears there has been a constant increase in net earnings.

From 1890 to 1903 the net earnings of the Ill. Cent. R. R. increased from $2,092,805 to $5,569,609—an increase of $3,476,804.

The net earnings of the L. & N. road increased from $4,949,720 to $10,872,126—an increase of $5,922,406.

The increases in net earnings of the other defendants are given in the report of the Commission. (Com. Rep., R. 73–74.)

We contend that an increase in the operating expenses of the carriers does not justify an advance in the rates CHARGED THE PUBLIC so long as the net earnings of the carriers continue to increase from year to year.

VI.

PERCENTAGE OF OPERATING EXPENSES TO GROSS EARNINGS.

It is insisted in behalf of the defendants that the percentage of operating expenses of the defendants to their gross earnings has somewhat increased and that their net revenue has not increased in proportion to their gross earnings. This would seem to be inevitable. As said by the Circuit Court for the Eastern District of Georgia in the Tift case:

"It is true counsel for the railroads insist that their net revenue did not increase in proportion to their gross earnings, but, in the nature of things, this is not to be expected in any business. A manufacturing enterprise of extensive character may make 10 per cent by the product of its mill. It may double its capacity and double its output, but it will look in vain for a double increase in the net earnings." (138 Fed. Rep., 766.)

VII.

BETTERMENTS AND PERMANENT IMPROVEMENTS INCLUDED IN OPERATING EXPENSES.

Moreover, the total operating expenses of the roads as reported by them to the Commission, have been much enlarged by the inclusion therein of large expenditures for betterments and permanent improvements, such as expenditures for real estate, station grounds, right of way, tunnels, &c. (Com. Rep., R., top. p. 75, 76.)

On this point the Commission finds:

"It is to be noted, that these operating expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges and other strictly permanent improvements and also for equipment, such as locomotives and cars. While payments for repairs, whether applied to permanent improvements or equipment, are properly chargeable to current annual operating expenses, this would not appear to be the case as to the improvements or equipment themselves—the former being permanent and the latter lasting for many years. The expenditures for permanent improvements and for equipment made in a single year may obviate the necessity for like expenditures or expenditures to the same extent for many years to come and the extraordinary amount of such expenditures made by the defendants in a few years preceding and including the year of the advance in rate indicates that they will not be required again for a long period of time. They should not, therefore, be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.' *If these large amounts are deducted from the annual operating expenses reported by the defendants, it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent.*"

VIII.

INCREASE IN OPERATING EXPENSES OF LUMBER MILL COMPANIES.

It is, furthermore, to be considered in this connection that the operating expenses of the lumber mill companies in the matter of wages and supplies

required in the manufacture of lumber have also grown. It is estimated that for the years 1902–3, the cost of the manufacture of lumber increased about 10 per cent. (Com. Rep., R., 84.)

IX.

RATE MADE BY AGREEMENT—COMPETITION STIFLED.

The defendants with, I believe, the exception of the Gulf & Ship Island Railroad Company, are members of an association styled the Southeastern Mississippi Valley Association.

Among other traffic, said in railway parlance to be "subject to this association," is that involved in this case, namely, yellow pine lumber shipped from the States of Mississippi, Alabama, and that part of Louisiana east of the Mississippi River to Central Freight Association territory.

Article III of this association provides that "all changes proposed by any member in its *rates*, rules and regulations, will be suggested to the association for *consideration* and discussion, provided, however, that nothing herein shall be construed as impairing the right of any member to change any of its rates, rules and regulations, according to law, whenever it deems it proper to do so."

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Under the first clause of this provision the association through its chairman corresponded and consulted with the defendants as to the advance in the lumber rate and the defendants themselves consulted with each other and considered the matter of making this advance. The letters of the officers of the association and of the traffic managers of the defendants on this subject are set forth in the record from page 688 to page 810, both inclusive. (R., 688–810.) It clearly appears from these letters and other testimony that as found by the Commission—

"The advance in the lumber rate was the outcome of a concert of action and a previous understanding between the railway companies. Through their authorized official representatives they conferred with each other repeatedly as to the making of an advance; recognized the fact that because of competition in common markets between the lumber-producing districts served by them the advance should be from all those districts or none, and finally they all promulgated the advance to take effect at exactly the same time and for exactly the same amount." (Com. Rep., R., 8663.)

It is claimed in behalf of the defendants that while this is so there was no binding agreement or contract between them to maintain the advanced rate. Bearing in mind that the object of the law in prohibiting agreements fixing rates is to give free play to competition, it is immaterial whether the action of the defendants amounted to a binding agreement or not, if that action resulted in stifling competition. As the Commission well says:

"Where rates are established by concert of action and previous understanding between the carriers, it is manifest, whether or not there be a binding agree-

ment to maintain such rates, the element of competition is eliminated. Concert of action is wholly inconsistent with competition, and during the time the rates fixed by concert of action are maintained the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates." (Com. Rep., R., 86.)

Competition is favored by the laws because it conduces to the reasonableness of rates, or, in other words, to the protection of the public from unreasonably high or excessive rates. In the *Joint Traffic Association case*, 171 U. S., 569, 571, 577 (see also *U. S.* v. *Freight Association*, 166 U. S., 341), this court holds that the suppression of competition is violative of the so-called "antitrust act" in that such suppression restrains trade and commerce by "keeping rates and charges higher than they otherwise might be under the laws of competition;" and in *U. S.* v. *Freight Association* this court says "competition will itself bring charges down to what may be reasonable." (166 U. S., 339.)

This court further holds in the Joint Traffic Association case, "the natural and direct and immediate effect of competition is to lower rates." (171 U. S., 577.)

The following is quoted from the report and opinion of the Commission:

"The act to regulate commerce in prohibiting, in section 1, unreasonableness of rates in effect forbids whatever conduces to such unreasonableness. In any event it is incumbent upon this Commission, whenever the reasonableness of rates is in issue before it, to

consider how those rates were brought about—whether they are the product of untrammeled competition or the result of a concert of action or combination between the carriers establishing and maintaining them. The advanced rates complained of in this case can not be claimed to be the outcome of competition because, in the language of the Supreme Court, 'the natural, direct, and immediate *effect of competition is to lower rates.' The advanced lumber rates must be presumed to be higher than rates which unrestrained competition would produce.*" (Com. Rep., R., 87.)

COMPETITION NEVER ADVANCES RATES.

It will be observed that the Commission does not hold, as I understand is contended by counsel for the defendants, that the advanced lumber rate is unreasonable solely because it was made on previous understanding and by concert of action between the carriers, but it holds that *that fact is a circumstance to be considered by it in connection with all the other facts bearing upon the reasonableness and lawfulness of the advanced rate.*

X.

LOADING CAPACITY.

One of the principal elements or factors considered by carriers in fixing rates is loading capacity. They insist that an article of light loading capacity should, other things being equal, have a higher rate than an article of heavier loading capacity. For example, in the case known as the Hay case, involving the classification and rate on hay from the Middle West to the New York and New England markets, the

carriers contended that hay should receive a higher classification and rate than grain and grain products, because the loading capacity of the latter was so much greater than that of the former.

If this rule is applied to lumber it will give lumber a relatively low rate.

The facts and tables given in the report and opin ion of the Commission show that lumber will load cars to a greater average per cent of their capacity than most all the articles with which it is compared by the Commission. (Com. Rep., R., 80–81.)

XI.

TONNAGE OF LUMBER AND OTHER ARTICLES.

Another matter given great weight by the carriers is the amount or tonnage of an article to which the rate is to be applied. No rule is more universally recognized by carriers or more firmly grounded in reason than that, other things being equal, the greater the tonnage of an article hauled or, in other words, the greater the density of the traffic in that article, the lower should be the rate.

Because of the greater density of the traffic in Central Freight Association territory north of the Ohio than in Southern territory south of the Ohio, the rates in the former are on an average not half as high as in the latter.

The tonnage of lumber hauled by the defendants and other roads in the United States is very large in proportion to that of other commodities of general use and necessity. (Com. Rep., R., bot. p. 81, top p. 82.)

The Commission in its report gives a table from which it appears that the tonnage of lumber hauled by the defendants, as stated in the reports of the roads to the Commission, is greater than that of grain, live stock, iron, and steel, merchandise, cement, brick, and lime, and in fact, than that of all articles of general use named in the table, excepting only anthracite and bituminous coal. That table is given below:

Item.	Total freight tonnage, originating on road and received from connections.		
	1901.	1902.	1903.
	Tons.	*Tons.*	*Tons.*
Grain	66,252,712	52,257,455	60,484,068
Fruit and vegetables	14,508,551	14,501,968	17,033,868
Live stock	15,667,146	15,477,500	16,460,788
Packing-house products	10,965,039	10,596,670	10,520,098
Anthracite coal	97,472,509	83,720,175	68,350,635
Bituminous coal	223,965,320	255,792,615	289,173,392
Agricultural implements	2,067,739	2,445,955	2,400,600
Household goods and furniture	2,271,960	2,661,909	2,961,648
Cement, brick, and lime	23,637,929	28,815,418	33,351,274
Iron, pig, and bloom	22,798,053	28,520,310	32,017,786
Iron and steel rails	7,479,840	10,101,691	10,700,602
Merchandise	43,468,315	47,015,216	55,898,707
Lumber	78,729,180	88,653,853	97,846,984

(Com. Rep., R., top p. 82.)

XII.

TAP LINE ALLOWANCES.

The advanced rate charged by the roads from territory west of the Mississippi, namely, Texas, Arkansas, and that part of Louisiana west of that river, to

Cairo, is 16 cents per hundred pounds, the same as that charged from east of the Mississippi to Cairo.

The testimony shows and the Commission finds that the railways west of the Mississippi make certain allowances to the mill owners ranging from 1 and 2 cents up to 6 cents per hundred pounds, out of the Cairo rate, for the transportation of the logs to the mills over what are known as "logging roads" which reach out from the mills into the lumber forests.

The roads east of the Mississippi who are the defendants in the present case, with the exception of the Mobile & Ohio road, do not make this allowance out of the Cairo rate, although the mills east of the river have logging roads just as is the case west of the river. The Commission finds:

"There does not appear to be any reason for making these logging road allowances west of the Mississippi River which does not apply east of the river, and, if the rate west of the river is reasonable minus the allowances, this is persuasive or gives color to the proposition that after a similar reduction the rates east of the river will still be reasonably high. The Mobile & Ohio road by voluntarily making the allowances east of the river practically concedes this proposition as to itself." (Com. Rep., R., 90, 89.)

The making of this reduction out of the Cairo rate from points west of the river, while it is not made out of that rate from points east of the river, necessarily gives, as found by the Commission, an advantage to the mills west of the river, and this can and should be done away with to a certain extent at least by enforcing the order of the Commission forbidding the advanced lumber rate east of the Mississippi.

XIII.

ORIGINATING ROADS.

Excessive Proportions Allowed Those Roads Out of the Through Rates to the Ohio no Ground for Increasing the Rate Charged the Public.

The roads which continue the transportation of the lumber from the Ohio River crossings to points of destination in Central Freight Association territory or elsewhere, charge their full local rates and do not participate in any division of the rates involved in this case, which are the rates from the lumber producing districts to the river.

The through rates to the river are divided between the roads called "originating roads," on which the lumber originates or is principally manufactured, and the roads receiving the lumber from those originating roads and transporting it on to the river crossings. The principal originating roads are the Gulf & Ship Island, extending from Gulfport, on the Gulf of Mexico, to Jackson, Miss., and the New Orleans and Northeastern Road, extending from New Orleans to Meridian, Miss. (R., 64).

The divisions of the rate allowed the originating roads are large in proportion to the lengths of the hauls made by them and in proportion to the balances left for the roads which continue the transportation on to the river crossings. For example, the average distance from lumber manufacturing points on the Gulf & Ship Island Railroad to Jackson is 80 miles, and 7 cents out of the 16-cent rate to Cairo

is allowed that road. This amounts to 17.5 mills per ton per mile and leaves 9 cents to the Illinois Central Road, which continues the haul from Jackson to Cairo, a distance of 366 miles. Deducting the bridge toll of 2 cents at Cairo there is left the Illinois Central 7 cents, which amounts to 3.8 mills per ton per mile.

The rate per ton per mile under the entire rate to the Ohio, *which the shipper has to pay*, is 7.17 mills per ton per mile, which is above the average, 5.91 mills, on all traffic. As lumber is a low-class traffic (class 6 under both the Southern and Official classifications), below the *average* classification, its rate should be below rather than above the *average* rate on all traffic. (R., 65, 66.)

The advance of 2 cents in the rate to Cairo and other Ohio River crossings complained of in this case appears to have been made solely for the purpose of increasing the proportions of the through rates of the roads which continue the transportation from the points of receipt of the lumber from the originating roads on to the Ohio. The testimony is that the 2 cents advance goes entirely to those roads. But for the large allowances made to the originating roads, the proportions left for the other roads would be much larger, and there would be no ground whatever for making the advance in order to increase those proportions. In reference to this matter the Commission makes the following finding:

"The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the

large allowances out of the rates made to the originating roads. (See Findings 3 and 4.) Those allowances commenced under the lower rates in force prior to the advance and raise the presumption that those lower rates minus the allowances were then considered reasonably remunerative for the remainder of the hauls to the Ohio River crossings. As the 2 cents advance goes entirely to the roads continuing the transportation on to the Ohio and none of it to the originating roads, the inference is that advance was made solely with a view of increasing the proportions of the former roads. If the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low proportions to the other roads, this can not be remedied by an advance in the total through rates *charged the public*. It is the total rate, and not its proportions, which is in issue." (R., 88.)

XIV.

FORMER RATES REASONABLE PER SE.

There is practically no contention that the 14-cent rate in force prior to the advance was not a reasonable rate in itself. Witnesses for the defendants admit there was profit to the carriers in the lumber business under that rate.

Lumber was a desirable traffic to the carriers before the advance in the rate and furnished a large proportion of their revenue.

The main defenses set up do not challenge the reasonableness in itself of the 14-cent rate.

It was claimed, as heretofore stated, that the 14-cent rate should have been advanced, not because it was unreasonably low in itself, but because there was great profit in the business of the shipper and because the expenses of the defendants had increased.

These defenses are consistent with the idea, if they are not an admission, that the 14-cent rate was reasonable in itself.

Attention is called to the following findings of the Commission:

"While the 13 per cent rate to Cairo was in force from 1894 to 1899, the testimony is that it yielded a profit to the carriers. The same is true as to the 14-cent rate in force from 1899 to the date of the advance, April 15, 1903. This rate of 14 cents appears to be reasonably high when compared with the rates on other kinds of lumber and on yellow-pine lumber from other points and when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume, and the various circumstances and conditions affecting the transportation of traffic.

"From 1894 to 1899, under the 13-cent rate, and from 1899 to 1903, under the 14-cent rate, there was a steady annual growth in net earnings of the defendants, with the exception of the Cincinnati, New Orleans & Texas Pacific Railway Company. The net earnings at the beginning and conclusion of each of those periods are shown below:

Net earnings under 13-cent rate.

Roads.	1895.	1899.
Southern Ry. Co.	$5,558,006	$8,853,160
Illinois Central R. R. Co.	6,762,382	9,011,408
Louisville & Nashville R. R. Co.	7,052,156	8,250,275
Cincinnati, New Orleans & Texas Pacific Ry. Co.	1,104,591	1,758,933
Alabama Great Southern R. R. Co.	580,075	642,285
New Orleans & Northeastern R. R. Co.	278,098	439,150
Mobile & Ohio R. R. Co.	1,009,303	1,182,238
Alabama & Vicksburg Ry. Co.	151,871	216,154
Gulf & Ship Island R. R. Co.	a 22,198	110,563

a 1897.

Net earnings under 14-cent rate.

Roads.	1899.	1902.
Southern Ry. Co.	$8,853,160	$12,076,229
Illinois Central R. R. Co.	9,911,408	14,572,907
Louisville & Nashville R. R. Co.	8,250,275	9,851,946
Cincinnati, New Orleans & Texas Pacific Ry. Co.	1,758,931	1,636,797
Alabama Great Southern R. R. Co.	642,285	798,771
New Orleans & Northeastern R. R. Co.	439,150	592,128
Mobile & Ohio R. R. Co.	1,182,238	1,625,019
Alabama & Vicksburg Ry. Co.	216,154	278,956
Gulf & Ship Island R. R. Co.	110,563	452,855

NOTE.—Up to September 9, 1899, the earnings were under the 13-cent rate.

(R., 77.)

XV.

WHY WERE NOT ALL RATES ADVANCED?
WHY WAS LUMBER SELECTED?
REASONS WHY LUMBER RATE SHOULD BE RELATIVELY LOW.

If, as contended by counsel for the defendants, there was an increase of expenses and an increase of revenue was needed to meet that increase in expenses, two questions arise.

First. Why was not this additional revenue raised by a general advance in rates or by an advance in the rates on all traffic and not by an advance in the rates on a comparatively few articles including lumber?

Secondly. If an advance in the rates on a comparatively few articles only was justified, why was lumber selected as one of those articles?

In considering the first question it is clear that if there was an increase in operating expenses *that*

increase resulted from the transportation and handling of all traffic and not from the transportation and handling of lumber and a few other articles.

There is no proof of an increase of expense in the handling and transportation of lumber. The increase was on traffic in general.

The increased expense, therefore, should have been met by an advance in all rates and, if it had been so met, the advance would have been so small on any one article as to have been no burden.

As to the second question, namely, if it was proper to advance the rates on a few articles to meet *expenses incurred in transporting all traffic,* why should lumber have been selected?

We answer that the matters proper to be considered or taken into account go to show that lumber should not have been selected.

The Commission finds, and its finding is sustained by the proof, that lumber should be given relatively low rates, because:

1. The service of handling and transporting lumber is *inexpensive.*

2. Neither rapidity of movement nor specially equipped cars are required for the transportation of lumber.

3. Lumber is neither fragile nor perishable; there is *small risk* in its transportation.

4. Lumber gives the carrier a tonnage second in magnitude only to that of one other article, coal.

5. The lumber business is constant, yielding the carriers revenue the year round.

6. Lumber is loaded by the shipper and unloaded by the consignee.

7. Where open cars are furnished, the shipper is required at considerable expense to equip them so as to protect the load and train.

XVI.

LUMBER OF GENERAL USE OR NECESSITY.

There is another reason why lumber should not have been selected for an advance of rates and that is the fact that lumber is an article *of general use or necessity*. It is used, and may be said to be essential, for building the cabins and unpretentious homes which shelter the great mass of our people from one end of the land to the other.

ARTICLES OF LUXURY AND GREAT VALUE SHOULD HAVE BEEN SELECTED.

If only a few articles should have been selected for an advance in rate, then we say articles of LUXURY AND GREAT VALUE should have been selected.

PUBLIC INTEREST TO BE CONSIDERED.

Inasmuch as carriers are quasi-public corporations, deriving their franchises, or in the language of this court, "their right to exist," from the public, and the consideration for which those franchises are granted is the obligation of the carrier to promote as far as possible the public interest, we con d that in all these cases the question is presente., whether the action of the carrier under investigation has been taken with due regard to the interests of the public.

THE PUBLIC IS A PARTY IN INTEREST.

It is a mistaken idea which railway officials seem to entertain that carriers have a right to make rates with regard solely to their own interests.

A railroad corporation has a public duty to perform as well as a private interest to subserve, and the courts should not permit the abandonment of the one for the promotion of the other. In *Smythe* v. *Ames* (169 U. S., 544) this court held that a proposition advanced by counsel was unsound in that, in the language of the court, it—

"Made the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed between it and the public."

The court further says:

"It can not be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests and ignore the rights of the public."

In *Covington and Lexington Turnpike Co.* v. *Sanford* (164 U. S., 596, 597) it is said:

"It can not be said that a corporation is entitled, as of right and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored."

It is particularly essential that carriers should have due regard to the interests of the public before advancing the rate on an article of general use and necessity like lumber.

XVII.

NO RELIABLE EVIDENCE TENDING TO SHOW ADVANCED RATE IS REASONABLE. RATES ON OTHER ROADS AND IN DIFFERENT SECTIONS OF THE COUNTRY NOT PROVEN TO BE STANDARDS OF REASONABLENESS.

In answer to all the matters which we have adduced in the foregoing argument showing the unreasonableness in itself, and .the *absence of all justification*, of the advance in rate, counsel for the carriers relies on a comparison of the advanced rate with lumber rates on other roads for like distances.

In order that this testimony be of any value, it should in the first place be shown that these other rates are correct standards of reasonableness. A direct investigation might show these other rates to be themselves unreasonable.

The best evidence is that furnished by the rates formerly charged by the defendants, which the testimony tends strongly to show were reasonably remunerative, and for the advance of which no valid excuse has been presented.

(See printed arguments filed in this case in behalf of appellee by T. M. Miller, esq., and Marcellus Green, esq.)

XVIII.

THE QUESTION, ONE OF FACT, "PECULIARLY WITHIN THE PROVINCE OF THE COMMISSION."

The Commission found on the testimony that the advance of 2 cents in the lumber rate was without just excuse and resulted in rates unjust and unreasonable in themselves. This was a finding of fact "peculiarly within the province of the Commission."

The court below sustained the findings of the Commission on the evidence.

We invoke in this case the rule laid down by this court that, where the Commission has duly investigated the facts and the court below has sustained the finding of the Commission on such investigation, this court will decline to undertake an original investigation of the facts on its own account and will not set aside the findings of the Commission except in a clear case of error.

C., N. O. & T. P. Ry. Co. v. *I. C. C.* (162 U. S., 194);
L. & N. R. R. Co. v. *Behlmer* (175 U. S., 675);
E. T., Va. & Ga. Ry. Co. v. *I. C. C.* (181 U. S., 27).

In C., N. O. & T. P. Ry. Co. *v.* I. C. C., *supra*, known as the "Social Circle case," this court refused to make an original investigation of the facts and set aside findings of fact of the Commission, because, as the court said, "the question was one of fact peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals."

Substituting Circuit Court for Circuit Court of Appeals, this is strictly applicable to the present case.

It is respectfully submitted that the decree of the court below should be affirmed.

L. A. SHAVER,
Solicitor for Appellee.

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